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IN THE SUPREME COURT

OF THE

STATE OF VERMONT

In re Petitions of Vermont Electric Power Company, Inc.

and Green Mountain Power Corporation,

Supreme Court Docket No. 2005-164

Appeals from Public Service Board

Docket No. 6860,

Orders of January 28 and March 11, 2005

BRIEF OF APPELLEE

VERMONT DEPARTMENT OF PUBLIC SERVICE

IN RESPONSE TO THE BRIEFS OF THE

TOWNS OF SHELBURNE AND NEW HAVEN ET AL.

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STATEMENT OF THE ISSUES

I. Issues Raised by the Town of Shelburne ("Shelburne")

a. Whether Shelburne may appeal on all but one of its asserted claims of error, since it failed to raise the relevant issues below. (Argument begins on page 6.)

b. In the alternative, whether Shelburne has met its burden to show clear error on the designation of a route through southern Shelburne. (Argument begins on page 7.)

c. In the alternative, whether Shelburne has met its burden to show that the Board's order does not reasonably state how it reached its decision on the southern part of Shelburne or the area of the Bostwick Road bridge/Meach Cove Trust land. (Argument begins on page 10.)

d. In the alternative, whether Shelburne has met its burden to show that the Board abused its discretion in allowing reconsideration, during post-certification review, of its decision to bury the line near Bay Road. (Argument begins on page 14.)

e. Whether Shelburne has met its burden to show a compelling indication of error in the Board's interpretation of the phrase "land conservation measures" under 30 V.S.A. § 248(b)(1). (Argument begins on page 16.)

II. Issues Raised by the Towns of New Haven and Middlebury, and the Addison

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STATEMENT OF THE CASE

Below the Board issued a certificate of public good ("CPG") under 30 V.S.A. § 248 to the Vermont Electric Power Company, Inc. ("VELCO") and Green Mountain Power Corporation ("GMP") (collectively, the "Petitioners") for a major project to keep the lights on in Vermont. The Board stated that this reliability project is needed now to address a serious problem:

> During those hours of the summer when northwest Vermont's electric demand is highest, the failure or unavailability of two of the four transmission lines [serving the area] could cause customers in that region, and possibly beyond, to lose electric service. This risk will increase rapidly as demand increases. In a society less dependent upon electricity (in terms of the economy, public health, and vital infrastructure), the level of risk inherent in the current system may have been acceptable, but we have clearly come to a time when increased demand upon an unimproved system would create greater risk than is appropriate for people who live in a complex and interdependent society, built upon an expectation of reliable electricity.

Appellants' SPC at 5 (quoted material), 12 (project needed now).

After carefully considering the evidence offered by several dozen parties during 37 days of hearing (id. at 232-240), the Board concluded that the project promotes the public good and, with appropriate conditions and scrutiny of final designs during post-certification review, can be constructed without undue adverse effect on the resources protected under the § 248(b) criteria. See, e.g., id. at 7, 226. The Board's decision with appendices covers 244 pages demonstrating detailed consideration of the issues. Id. at 1-244. The CPG contains 20 conditions including required modifications to the project such as line burial near Shelburne's Bay Road and relocating the New Haven substation

proposed for expansion. Id. at 246. The Department incorporates the Petitioners' statement of the case.

The Department disagrees with and objects to the Joint Appellants' statement of the case, which violates VRAP 28(a)(3)'s requirement that such a statement be "concise." The Joint Appellants present a 17-page statement which discusses the evidence at length, apparently asking the Court to weigh the evidence differently from the Board. That is not the Court's function. In re Petition of Green Mt. Power Corp., 131 Vt. 284, 305 (1973).

Shelburne's statement of the case similarly attempts to ask the Court to reweigh the evidence, claiming a level of scenic significance and "threat" to scenic resources beyond what it was able to persuade the Board to find below.

SUMMARY OF ARGUMENT

Shelburne failed to raise most of its claimed errors below and therefore may not do so now. These claims include the Board's alleged failures to designate a route through southern Shelburne and to adequately explain its decision in this area and the area near the Bostwick Road bridge and Meach Cove Trust land. They also did not argue below that the Board cannot allow reconsideration of its burial order. Had Shelburne raised these arguments below, the claims to the Court might have been avoided. In the alternative, the claims are not meritorious, for reasons set out below in this brief.

Shelburne also fails to demonstrate a compelling indication of error with the Board's two separate conclusions that "land conservation measures" under 30 V.S.A. § 248(b)(1) include only: (a) those local plan provisions relating to conserving land and

(b) specific land conservation policies and not general provisions. The very phrase *land conservation measures* supports the Board's conclusions. Further, the rationale in Act 250 cases for requiring that plan provisions evince "specific policies" applies to § 248(b)(1), since requiring a § 248 applicant to persuade the Board to act or not act based on abstract language is no more equitable than it is for an Act 250 applicant.

Like Shelburne, the Joint Appellants claim errors above that they did not raise below: the Board's alleged failures adequately to explain why it was not persuaded by testimony, proposed findings, and local recommendations on: (a) the benefits of a 115 kV alternative to the approved 345 kV line and (b) burying the approved 115 kV line at Route 17 in New Haven. The Joint Appellants cannot pursue these claims on appeal. In the alternative, the claims are not meritorious, as set out later in this brief.

The Joint Appellants also fail to show clear error or any error in the Board's decision that the appropriate transmission solution includes a 345 rather than 115 kV line from West Rutland to New Haven. The Joint Appellants' transparent attempt to convince the Court to reweigh the relevant evidence is unavailing. The Board gave extensive consideration to transmission alternatives to the project, including alternatives with a 115 kV line from West Rutland to New Haven. The Board's decision was supported by the evidence and its evaluation of multiple factors within its expertise, including reliability, cost, possibility of electrical line losses, potential impact on more communities and the environment, and the potential for a given option to limit the load serving capabilities of future expansion. No statute or case requires even more detailed evidence to support the

Board's decision, and the Joint Appellants demonstrate no compelling indication of error with respect to the relevant interpretation of § 248 by the Board.

On the issue of medical devices, the Joint Appellants similarly fail to show clear error or any error. The Board carefully weighed the evidence and explained its determination that the project will have no undue adverse effect on such devices. Importantly, the Joint Appellants are wrong when they suggest a health-based standard exists or that because of such a standard people with medical devices would have to change their daily lives.

The Joint Appellants again fail to show clear error or any error in challenging the Board's reference in paragraph 1 of its order to the submitted "evidence and plans." Appellants' SPC at 226. They have no standing to appeal on this issue, since they are not harmed themselves and attempt improperly to assert the rights of others. In the alternative, their claims are not meritorious for the reasons set out below.

ARGUMENT

I. **Shelburne and the Joint Appellants face a significant burden on appeal.**

Shelburne and the Joint Appellants bear a serious burden in challenging the Board's determinations below. There is a strong presumption that orders issued by the Board are valid. In re East Georgia Cogeneration Ltd. Partnership, 158 Vt. 525, 531 (1992). 30 V.S.A. § 11(b) requires a deferential standard of review for factual determinations of the Board, stating: "Upon appeal to the supreme court its findings of fact shall be accepted unless clearly erroneous." See East Georgia, 158 Vt. at 531. The

burden of proving clear error falls to the appealing party. East Georgia, 158 Vt. at 532.

With respect to the Board's weighing of the evidence, the Court applies a highly deferential standard:

> On review, it is not the function of this Court to require the facts be found in accordance with our view of the evidence, thereby substituting our judgment for the Board. Rather, we will sustain their weighing of the evidence if there is evidence to support it. In this respect, it is not for this Court to review the rightness of the Board's findings; rather it is only for this Court to review the reasonableness of those findings.

In re Petition of Green Mt. Power Corp., 131 Vt. at 305 (citation omitted).

For abuse of discretion claims, the standard is similarly deferential, requiring a demonstration "that discretion is exercised on grounds or for reasons *clearly* untenable, or to an extent *clearly* unreasonable." In re Petition of Tom Halnon, 174 Vt. 514, 517 (2002) (mem.) (emphasis added).

The Court also defers to the Board on matters within its expertise. East Georgia, 158 Vt. at 531. In this regard, Shelburne cites no specific authority for its claim that the Board's expertise does not include environmental and aesthetic matters, instead relying on a case about "the applicability of judicially-created doctrines such as claim preclusion or issue preclusion . . . ." In re Tariff Filing of Central Vermont Public Service Corp., 172 Vt. 14, 19 (2001). In contrast, 30 V.S.A. § 248(b) legislatively assigns *to the Board* the application of environmental and aesthetic criteria to transmission and generation projects, and the Board routinely applies these criteria in § 248 cases. All the reasons for deference apply to the Board's application of these criteria.

Finally, the Court sustains the Board's interpretation of its enabling legislation

unless there is a compelling indication of error. In re Vermont Yankee Nuclear Power Station, 2003 VT 53 ¶ 5, 175 Vt. 368, 371 (2003).

II. None of Shelburne's claims warrants reversal.

A. Shelburne may not maintain most of its claimed errors because it did not raise them below.

Parties may not appeal issues not raised or decided below:

> Contentions not raised or fairly presented below are not preserved for appeal. . . . The issue must be presented with sufficient specificity and clarity to the give the tribunal a fair chance to rule on it.

Vermont Yankee, 175 Vt. at 375 (citation omitted). If not raised prior to decision, the issue is waived if not raised in a post-decision motion. Halnon, 174 Vt. at 516; In re Quechee Lakes Corp., 154 Vt. 543, 552 (1990).

On appeal, Shelburne includes claims that it did not raise below and therefore cannot raise before the Court. These claims are that the Board: (a) failed to designate a route through the south part of town, (b) failed to demonstrate in sufficient detail how it reached its conclusions under the so-called "Quechee" test regarding the project's impact on the southern area of town, (c) made findings that are "too limited and too conclusory" (Shelburne's Brief at 20) on the segment of the project near the Bostwick Road bridge, and (d) may not allow reconsideration of the requirement for line burial near Bay Road.

Shelburne did not argue to the Board that it *must* as a matter of law designate a route through the southern part of town, state its findings and conclusions to a particular level of detail, or state how it applied each element of the Quechee test. See, e.g., Shelburne PC at 78-86. Shelburne never argued below that the Board could not allow

reconsideration of the burial order. Shelburne filed no post-decision motion.

While Shelburne expressed a *preference* for a route in the southern part of town – with the line burial – and proposed that the Board make various detailed findings and conclusions regarding that location and the Bostwick bridge area (id. at 32-45, 91), these contentions are not the same as claiming that the Board must as a matter of law specify a route when it issues a CPG or that the Board is legally bound to issue findings at the same or other level of detail. Shelburne did not squarely raise these issues to the Board. Moreover, it asked the Board to deny a CPG rather than designate a route. Id. at 101.

B. In the alternative, Shelburne has not shown clear error with respect to the designation of a particular route through southern Shelburne.

Shelburne claims that the Board did not designate a particular route through the southern part of Shelburne and that this alleged failure violates 30 V.S.A. § 11(b)'s requirement to make findings of fact. Shelburne's Brief at 11. As stated above, Shelburne failed to raise this issue below and therefore cannot raise it on appeal. In the alternative, Shelburne's claim is not meritorious.

The purpose of a requirement for findings is to state what was decided and how it was decided. In re Hardwick Elec. Dept., 143 Vt. 437, 445 (1983). The Board's findings must be adequate to support its decision; it is not required to be " 'a paragon of completeness and clarity.' " Id., quoting Timney v. Worden, 138 Vt. 444, 445 (1980). Moreover, "it is the duty of this Court to look for all reasonable inferences to support the

result reached if it can reasonably do so." Timney, 138 Vt. at 445.[1]

The evidence cited by the Board in the relevant findings shows that the Board selected the Meach Cove Reroute described by Shelburne. For example, Finding 320 of the order determines that lower pole heights will reduce visual impacts in this area, citing rebuttal testimony of Boyle at 17. Appellants' SPC at 121. That testimony states:

> Lower poles are going to be used by VELCO in *Meach Cove* consistent with Mr. Raphael's recommendations. The use of shorter poles (*see VELCO Exhibit TD Reb-3)* will reduce any impacts to Shelburne Museum and Shelburne Farm.

Department's SPC at 11 (emphasis added). In turn, the cited Exhibit TD Reb-3 is entitled, and shows, the "Meach Cove Reroute." Department's SPC at 12-14.

The order would be lawful even if it did not select a route through the southern part of Shelburne, because the Board would have certified a route generally through that part of town, with specifics to be determined during post-certification review.[2] The Board has the authority, in a § 248 proceeding, to certify a general rather than specific route, leaving specifics to post-certification proceedings. In re Vt. Electric Power Co., 131 Vt. 427, 434-5 (1973). Trying ineffectively to distinguish that case, Shelburne focuses solely on differing facts rather than the principle endorsed by the Court, which was not that the Board must choose among various route options before issuing a CPG. In fact, the Court elsewhere clarified that the *obligation* of the Board to choose a particular route does not

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[1]A separate holding of Timney relating to the criteria for abandonment of an easement was overruled by Lague, Inc. v. Royea, 152 Vt. 499, 502-03 (1989).

[2]Ironically, Shelburne claims that the Board was not specific enough regarding line location, while the Joint Appellants claim that the Board was too specific.

arise until post-certification proceedings:

> The right and duty of the Board to see to the designation of a particular route *based on the results of a 30 V.S.A. § 248 proceeding* was fully set out in *In re Vermont Electric Power Co., supra*, 131 Vt. 427, 434-5. That case adequately sets out the basis for certification of a general route, *followed by the determination, accompanied by appropriate hearings, of the specific route*.

Vt. Electric Power Co., Inc. v. Bandel, 135 Vt. 141, 145 (1977) (emphasis added; citation italicized in the original). Thus, while the Board may determine a specific route prior to issuing a CPG, it does not have to do so until post-certification review.

Shelburne further does not show reversible error through its claim that route designation is critical because the impacts of potential routes differ. Shelburne's Brief at 11. The Board will review the final design and aesthetic mitigation plans, which will need to show a specific route, during post-certification review, and will provide Shelburne and other parties with an opportunity to comment on the plans and request a hearing at which such impacts can be raised. Appellants' SPC at 216-18.

In connection with the route designation, Shelburne inaccurately characterizes as "evolving" the recommendations of DPS witness Raphael. Mr. Raphael provided opinions on the aesthetic impacts of the routing proposals for this area as they were made by others. See Exhibits DPS-DR-1 at 27-8 and DPS-DR-10 at 8; Tr., June 17, 2004 at 84-5 (vol. 1); prefiled surrebuttal test. of D. Raphael at 9 (Sep. 3, 2004).

C. In the alternative, Shelburne fails to show that the Board's order does not reasonably state how it reached its decision on: (1) the southern part of Shelburne or (2) the area of the Bostwick Road bridge.

Based on 30 V.S.A. § 11(b) (requirement for findings of fact) and 3 V.S.A. § 812 (requirement for findings of fact and conclusions of law), Shelburne attacks the Board's decision on two separate areas, the southern part of Shelburne and the area near the Bostwick Road bridge/Meach Cove Trust land. The gist of Shelburne's complaint is that the Board did not, in Shelburne's view, say enough about how it applied the Quechee test to these areas. Shelburne's Brief at 17, 20. As stated above, Shelburne failed to raise these issues below and therefore cannot raise them on appeal. In the alternative, Shelburne's complaint is not meritorious.

The Board's decision meets the requirements of 30 V.S.A. § 11(b) and 3 V.S.A. § 812. In this regard, 3 V.S.A. § 812(a) requires only that Board provide a "concise and explicit statement of the underlying facts . . . ." As applied by the Court, the requirements of these statutes are that the Board clearly state its decision and how it was reached. Hardwick, 143 Vt. at 445. The requirements are about adequacy, not comprehensiveness. Id. The Board need not "report all of the evidence or exhaustively state the effect given subordinate facts." In re Hemco, 129 Vt. 534, 537 (1971). Nor must the Board rule individually on each requested finding. Hardwick, 143 Vt. at 445.

The Board's decision on aesthetics is clear: The project, "with the modifications and conditions required in this Order, will not have an undue adverse effect on aesthetics or on the scenic or natural beauty of the area." Appellants' SPC-81. The Board makes

roughly 250 supporting findings, covering approximately 50 pages with related discussion, on the over 60 miles of proposed transmission line, 12 substation upgrades, other project components, and design options. Appellants' SPC at 81-139. The Board states that it applied the Quechee test (Appellants' SPC at 80) and includes conclusions of law generally discussing the project and specific locations that the Board found particularly sensitive. Appellants' SPC at 140-42.

The Board made concise findings on each of the specific areas raised by Shelburne, determining whether the impacts would be aesthetically adverse from the view points it deemed significant. Appellants' SPC at 120-21. The Board determined that the impacts would not be undue if certain mitigation measures were taken. Id.[3]

These findings meet the requirement for a clear and concise statement of the decision and the findings supporting it. 3 V.S.A. § 812(a). In this regard, DPS disputes the claim that the Board is legally required to detail how it applied each element of the Quechee test to the areas in question. Again, the Board is not required to state the effect given to all subordinate facts. Hemco, 129 Vt. at 537. For a project involving over 60 miles of proposed transmission line and a dozen substations, the claim for more detail is unreasonable. Explicating a detailed Quechee analysis for all project locations would be a significant task and result in an even more voluminous decision. A requirement for such detail could not reasonably be limited to the areas raised by Shelburne, since the Board

[3]Contrary to Shelburne's claim, when these findings are viewed in the context of the Board's detailed review of the aesthetic impacts of the project, it is clear that the Board did thoughtfully apply the Quechee test.

must make findings for the entire project. 30 V.S.A. § 248(b).

Moreover, while Shelburne claims that "application of the full Quechee analysis [is] required by law," Shelburne's Brief at 20, the statutes do not require that the Board use the Quechee test or detail how it applied each element of that test. Instead, they require a decision on whether the project will have an undue adverse effect on aesthetics, with supporting findings of fact. 3 V.S.A. § 812; 30 V.S.A. §§ 11(b), 248(b)(5).

Shelburne's cited cases also do not support its proposition. Halnon does not state that the Board must detail how it applied each element of the Quechee test or that the Quechee test is required. Rather, that decision merely restates the Quechee test "[f]or purposes of clarification" and upholds a Board denial of a § 248 application in the face of challenges based on site visit procedures and a decision that the applicant had not taken sufficient mitigating steps. 174 Vt. at 515-17.

In re McShinsky, 153 Vt. 586 (1990) similarly does not address the required amount of detail in a decision below or whether the Quechee test is required. Instead, with respect to aesthetics, it addresses whether the decision below was adequately supported by the record. Id. at 591.

Further, contrary to a related argument by Shelburne, the function of the Court is *not* to evaluate the "validity" of the Board's conclusions on aesthetic impact or the sufficiency of mitigating steps (Shelburne's Brief at 20), but rather to determine whether there was clear error. The Court reviews not the "rightness" of the findings but their "reasonableness." Green Mt. Power Corp., 131 Vt. at 305.

The same principle undermines Shelburne's assertions on the significance of the views and aesthetic impacts in these areas of town, which represent little more than asking the Court to weigh the evidence differently from the Board. Shelburne may have submitted evidence and proposed findings on those views and impacts below, but the Board denied any proposed findings which it did not adopt. Appellants' SPC at 225.

There is no reversible error in the Board's not being persuaded to assign the same level of significance to views and impacts as does Shelburne or to order the full extent of line burial sought by that town. The Board, as the trier of fact, may believe or reject all or part of any party's testimony:

> The trier of fact has the right to believe all of the testimony of any witness, or to believe it in part and disbelieve it in part, or to reject it altogether. Thus, it is not for this Court to reweigh conflicting evidence, reassess the credibility or weight to be given certain testimony, or determine on its own whether the factual decision is mistaken.

In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975) (citations omitted).

Shelburne again founders on this principle when it challenges Finding 317 (Appellants' SPC at 120). It claims that the finding is "without factual foundation" because it "mischaracterizes" the supporting witness's testimony by "ignoring" Shelburne's cross-examination. But the finding is well founded on the testimony. The finding states:

> While the 115 kV line as proposed in the area of the Bostwick Road bridge crossing and the Meach Cove Trust property will result in an adverse aesthetic impact, the impact will not be undue if the following mitigation measures are taken: careful pole placement; lower pole heights; retention of as much vegetation at the edge of corridor as possible; and plantings. Raphael DD pf. at 12; exh. DPS-DR-1 at 26–27.

Appellants' SPC at 120 (citations in the original). The cited testimony reads thus:

> While the upgrade as proposed will result in an adverse impact, mitigation measures such as careful pole placement, lower pole heights, retention of as much vegetation at the edge of corridor as possible, presence of background vegetation and other landscape elements in the corridor, as well as proposed plantings, provide sufficient mitigation to avoid an undue adverse impact in this section.

Department's SPC at 17.

Shelburne's emphasis on its cross-examination of the witness only underscores that the Board was not persuaded to give the cross-examination the same weight as Shelburne does, which the Board was not required to do. Wildlife Wonderland, Inc., 133 Vt. at 511. The Board had reason not to be so persuaded based on further examination of the witness, who stated that he was aware of no obstacles that would preclude implementation of the recommended mitigation, he was confident it could be implemented, and the Board should require the mitigation. Department's SPC at 19-20.

D. In the alternative, Shelburne has not met its burden to show that the Board abused discretion in allowing reconsideration of line burial.

As stated above, Shelburne failed to raise this issue below and therefore cannot raise it on appeal. In the alternative, Shelburne's claim is not meritorious.

Shelburne has not shown that the Board abused its discretion in allowing VELCO to seek reconsideration during post-certification review of the requirement for line burial near Bay Road. Since the statutes do not specify the exact parameters of post-certification review, they are left to the Board's general authority and discretion to control the order of its business. In re Green Mountain Power Corp., 147 Vt. 509, 516 (1986).

The Board's decision is not clearly unreasonable or untenable. Halnon, 174 Vt. at

517. The Board cited the important interests of the state in limiting the cost to ratepayers and assuring protection of archaeological and natural resources:

> We recognize that an additional cost of between $2.5 million and $3.4 million is a significant cost, and that there may be as-yet unknown issues, such as archaeological resources, that would create some problems in placing the line underground in this area. This line is not scheduled to be constructed until Fall 2006. Thus, if VELCO can develop a significantly more creative alternative design for an overhead line than has been previously submitted that addresses our concerns, VELCO may request that we reconsider our decision to place this portion of the line underground.

Appellants' SPC at 129, n. 148 (citation omitted). It is reasonable to allow VELCO a further opportunity to meet the Board's concerns if it can be done through a significantly less costly design. In addition, Shelburne's claim that the opportunity is "open-ended" ignores the Board's requirement that, if VELCO seeks such reconsideration, it must propose a schedule for doing so during post-certification review. Appellants' SPC at 220.

With respect to the authorities cited by Shelburne, VRCP 60 nowhere prohibits the Board, in a certification order under § 248 setting the parameters of post-certification review, from allowing reconsideration of an issue during that review. Since final designs could have different costs or impacts from preliminary designs, the Board in fact must have this flexibility if post-certification review is to assure that a project meets the criteria of § 248(b).

The doctrine of collateral estoppel does not apply, for two separate reasons. First, the doctrine bars an issue "that was actually litigated by the parties and decided *in a prior case*." Central Vermont Pub. Serv. Corp., 172 Vt. at 20 (emphasis added). Post-certification review is a phase of the same § 248 case. Second, preclusion does not arise

when, as here, the plain language of the order allows later review. Zingher v. Department of Aging and Disabilities, 163 Vt. 566, 571 (1995).

E. Shelburne has not shown a compelling indication of error in the Board's interpretation of "land conservation measures" under § 248(b)(1).

30 V.S.A. § 248(b)(1) requires that the Board find the project:

> [W]ill not unduly interfere with the orderly development of the region with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and *the land conservation measures contained in the plan of any affected municipality*. . . .

(Emphasis added.) Below, the Board reached two conclusions regarding the phrase "land conservation measures" within this enabling statute: (a) an initial conclusion that the phrase relates only to provisions directed toward conserving land and (b) a further conclusion that such provisions must evince a "sufficiently specific policy." It said:

> We also must determine what constitutes "land conservation measures" in the municipal plans. *Applying the plain language of the statute*, such measures are those that are specifically directed toward land conservation, and not general policy statements that apply indiscriminately throughout the municipality. Thus, a general statement in a municipal plan calling for all transmission lines to be buried, regardless of whether they would be located in a developed or undeveloped portion of the municipality, would not by itself constitute a "land conservation measure."
>
> Consistent with the Vermont Supreme Court's precedent in applying the Act 250 requirement of conformance with local plans, we further conclude that for a provision in a municipal plan to constitute a "measure" that is cognizable under Section 248(b)(1), that provision must "evince a sufficiently 'specific policy' " promoting land conservation. *In re John A. Russell Corp.*, 2003 VT 93, ¶ 19, 838 A.2d 906, 913 (Vt. 2003). The Court concluded that without that specificity, it would be "thus left with precisely the sort of broad goals lacking in specific policies or standards that we have consistently disallowed as the basis for the denial of a permit under Criterion 10." *Id.* Non-specific provisions of municipal plans should not

> carry more weight in applying Section 248(b)(1) than in applying Criterion 10 of Act 250 (10 V.S.A. § 6086(a)(10), given that Section 248(b)(1) requires "due consideration" of the land conservation measures of the municipal plans, rather than a finding of conformance as required by Criterion 10.

Appellants' SPC at 201-02 (italicized emphasis added, citations as in the original).

The Court upholds the Board's interpretation of its enabling statute absent compelling indication of error. Vermont Yankee, 175 Vt. at 371. In construing a statute, the Court first looks to the language of the statute itself, with the legislature presumed to intend the plain meaning. Town of Hinesburg v. Dunkling, 167 Vt. 514, 525 (1998).

The Court should sustain the Board's interpretation, which is supported by the statute's plain language: The legislature required the Board to give due consideration to "land conservation measures" contained in a local plan. The plain meaning of the words encompasses those measures in a plan that are directed toward conserving land and not other plan provisions, whether they are general goals or specific policies directed at other objectives. If the legislature had meant the Board to give due consideration to all town plan provisions, it would not have included the phrase "land conservation measures." Worker's Compensation Division v. Hodgdon, 171 Vt. 526, 528 (2000) (mem.) (Court will not construe statutory language as mere surplusage).

Shelburne unpersuasively argues that, for the "orderly development" inquiry to be meaningful, the phrase "land conservation measures" must include town plan provisions "that reflect the long-term goals and objectives of a town and region regarding aesthetics, historic sites, conserved and preserved properties and the 'vision' for a community's

future." Shelburne's Brief at 26. Section 248(b)(1) separately contemplates that the Board is to give "due consideration" to the recommendations of the municipal legislative body and the municipal and regional planning commissions, in addition to the land conservation measures in the local plans. 30 V.S.A. § 248(b)(1). Each of these bodies thus through testimony can make recommendations directly to the Board that reflect long-term goals on scenic, historic, and conserved lands, and the community's vision.

As part of this claim, Shelburne inaccurately states that the interpretation excludes conservation provisions that "do not specifically address the siting of transmission facilities . . . ." Shelburne's Brief at 26. The Board made no such statement.

Shelburne also is unpersuasive in contending that error is *compelled* by the number of towns whose plan provisions were determined not to be specific enough to constitute "land conservation measures." Pointing to a particular number of towns is no indication of legislative intent, and interpreting § 248(b)(1) is assigned to the Board, not the towns. Moreover, the determination could simply mean that the language in most of the plans is not sufficiently specific. The Court is acquainted with the pervasiveness of non-specific language in local plans. In re Molgano, 163 Vt. 25, 29-31 (1994); In re Kisiel, 172 Vt. 124, 129-30 (2001); In re John A. Russell Corp., 2003 VT 93 ¶ 18, 176 Vt. 520, 523-24 (2003) (mem.).

For several reasons, Shelburne again is unpersuasive on the difference in treatment of municipal plans under § 248(b)(1) and 10 V.S.A. Chapter 151 ("Act 250").

First, Shelburne is incorrect that the Board determined Act 250 cases to "control."

Shelburne's Brief at 23. The Board relied on the statute's plain language and did not use those cases at all in its initial conclusion that the phrase "land conservation measures" only includes provisions directed toward conserving land. Shelburne's Act 250 arguments thus do not apply to the Board's initial conclusion.

The Board's further conclusion – that to be a "measure" a provision must evince a specific policy – also is not based on a decision that Act 250 case law "controls." It was based on the term "measure," the very notion of which connotes specificity. The Board stated that its decision was "consistent with," not controlled by, Act 250 case law.

Second, the rationale behind the Act 250 case law cited by the Board applies to § 248(b)(1) with at least as much, if not greater, force. This Court has consistently ruled against giving "legal force" to "nonregulatory abstractions" in town plans. Molgano, 163 Vt. at 31; John A. Russell Corp., 2003 VT 93 ¶ 16, 176 Vt. at 523.

A § 248 case is a regulatory proceeding in which legal action is taken on an applicant's request for a CPG based in part on review of whether the project "will not unduly interfere with the orderly development of the region," and the outcome of that review is based in part on the "due consideration" that is to be given to "land conservation measures" in the applicable local plan(s). 30 V.S.A. § 248(b)(1). It is as inequitable to require a § 248 applicant to persuade the Board to act or not to act based on a "regulatory abstraction" as it is for an Act 250 applicant.

Third, the General Assembly indicated that local plans have less weight in § 248 proceedings by providing for "due consideration" of land conservation measures in a town

plan rather than, as in Act 250, requiring conformance with the plan. 30 V.S.A. § 248(b)(1), 10 V.S.A. § 6086(a)(10), City of South Burlington v. Vt. Elec. Power Co., 133 Vt. 438, 447 (1975). It would undermine this intent to give greater force in § 248 proceedings to abstract town plan provisions that have no force in Act 250.

III. None of the Joint Appellants' claims warrants reversal.

A. The Joint Appellants may not pursue claimed errors that they did not raise below; in the alternative, these claims are not meritorious.

The Joint Appellants did not raise below their claims that the Board allegedly failed adequately to explain why it was not persuaded by testimony, proposed findings, and local recommendations on: (a) the benefits of a 115 kV alternative to the approved 345 kV line and (b) burying the approved 115 kV line at Route 17 in New Haven. Joint Appellants' Brief at 27-30, 33-4.

While below the Joint Appellants may have proposed findings regarding the relevant testimony and made substantive arguments on these issues (see, e.g., NHPC at 547-56, 566-576), these contentions are not the same as arguing that the Board is required legally to explain why it was not persuaded by the testimony, proposed findings, or local government recommendations. Further, while New Haven and Simmons did submit post-hearing motions, those motions failed to make the above-described arguments, and neither Middlebury nor Addison County submitted a post-decision motion. NHPC at 719-726; Shelburne's PC at 1-13.

The Joint Appellants never gave the Board the opportunity to rule on these arguments and therefore failed to preserve them. Vermont Yankee, 175 Vt. at 375.

In the alternative, the Joint Appellants fail to demonstrate clear error or any error. The Board is not required to rule on each requested finding. Hardwick, 143 Vt. at 445. The order meets the applicable legal requirements because it clearly states its findings and decisions regarding the issues of a 115 kV alternative to the 345 kV line and the aesthetic impacts of the Route 17 crossing and how those decisions were reached. 3 V.S.A. § 812; Hardwick, 143 Vt. at 445; Appellants' SPC at 40-1, 44-5, 99-107.

In this regard, the next section of this brief details the Board's consideration of transmission alternatives, including 115 kV alternatives to the approved 345 kV line.

With respect to Route 17 in New Haven, the Board carefully considered the testimony on this location and required relocation of the existing substation proposed for expansion and the existing and proposed 115 kV line crossings. Appellants' SPC at 99-107. The Board's order also considered burial:

> [U]nderground placement of sections of the 115 kV line could constitute a reasonable measure to mitigate aesthetic impacts, but only if the substantial cost is warranted by the specific circumstances. Based on our review of the evidence, and for reasons discussed below, we conclude that such circumstances are presented in the Bay Road area of Shelburne and, possibly, in the Ferry Road area of Charlotte.

Appellants' SPC at 99. For the Route 17 crossing, the Board clearly debated whether undergrounding was necessary. The majority determined that "the aesthetic impacts of the lines will be sufficiently mitigated by the relocation of the lines to the west." Appellants' SPC at 107. The Chair, however, argued in a separate statement for burial of those lines rather than relocation of the substation. Appellants' SPC at 230.

The majority's decision is in accord with an alternative offered by New Haven

aesthetic witness Jean Vissering. While she preferred burying the Route 17 crossing, she suggested the alternative of moving the substation and running "the above ground lines along the west edge of the open field. Continue the lines in this location across Route 17 to a point to the north where they can angle behind existing trees . . . ." NHPC at 339. She stated that "this alternative removes the major impact of the line running through the center of the field." An evergreen backdrop would mitigate the impact of the view to the west and "[v]iews heading east would be substantially improved." Id.[4]

B. The Joint Appellants have not met their burden to show that the Board clearly erred in being persuaded by the evidence supporting the 345 kV line over a 115 kV alternative.

A common theme of the Joint Appellants' various claims against the approved 345 kV line is disagreement that the Board was persuaded by the evidence in support of that line instead of a 115 kV alternative. Apparently asking the Court to weigh the evidence, the Joint Appellants spend seven pages in a one-sided recounting of evidence presented to the Board on this point, and then spend many pages trying to transmute this evidentiary dispute into claims of legal error. Joint Appellants' Brief at 1-8, 17-30.

1. The Board made extensive findings on transmission alternatives.

Under § 248(b)(2), the Board found that "[t]he proposed Project," including the 345 kV line:

> [I]s now required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures, including but

[4]Relocating the Route 17 crossing was also supported by testimony of DPS witness Raphael as satisfying the Quechee test. NHPC at 117.

> not limited to those developed pursuant to the provisions of 30 V.S.A. §§ 209(d), 218c, and 218(b).

Appellants' SPC at 4 ("Project" includes 345 kV line) and 12 (quoted material). The Board issued 107 supporting findings, covering 40 pages, with seven pages of additional discussion and conclusions. Appellants' SPC at 12-59. These findings covered the relevant sub-issues, including reliability standards, existing transmission system deficiencies, present and future demand for service, the project as a solution, transmission-only alternatives, and alternative resource configurations. Id.

The Board made 11 findings concerning eight possible transmission alternatives to the project, including three alternatives that involved a 115 kV instead of a 345 kV line from West Rutland to New Haven. Appellants' SPC at 39-42. Concerning these three alternatives, the Board found:

> 69. Alternative (2), the proposed double-conductoring of the existing West Rutland to New Haven 115 kV line in lieu of constructing the proposed 345 kV line, would increase the thermal capacity of the line. However, this alternative would only reduce the impedance of the West Rutland to New Haven corridor by approximately 20–30%, while the proposed 345 kV line would reduce the impedance by 90%. Therefore, the 115 kV line reconductoring would not solve voltage problems caused by contingencies elsewhere on the transmission system. The higher impedance of this alternative would also result in higher electrical losses than would the proposed 345 kV line. For this alternative to attain comparable reliability to the proposed Project, it would also require at least a second 115 kV line between Granite and Middlesex, and possibly other upgrades. This alternative would preserve the West Rutland to New Haven corridor for a future upgrade to 345 kV. Smith and Litkovitz reb. pf. at 10; tr. 2/11/04 (Vol. II) at 152–159 (Planning Panel).
>
> 70. Alternative (3), a second 115 kV line between West Rutland and New Haven in lieu of constructing the proposed 345 kV line, is similar to Alternative (2), above. Because Alternative (3) is a separate 115 kV

> circuit, it would result in an impedance reduction of approximately 50%, but would still result in a much higher impedance than the proposed 345 kV line. This alternative would require a second 115 kV line between Granite and Middlesex at a state-wide load level of 1,140 MW to achieve the same reliability as the proposed Project (see Alternative (4)). Exh. Planning-8 at 24; Smith and Litkovitz reb. pf. at 10–11.
>
> 71. Alternative (4), a second 115 kV line from West Rutland to New Haven and a second 115 kV line between Granite and Middlesex, is considered by VELCO to be the next-best alternative, after the proposed Project. This alternative would provide the same level of reliability as the proposed Project. However, this alternative would result in higher impedance (and therefore higher losses) than the proposed 345 kV line, would result in additional environmental impacts along the Granite to Middlesex corridor, does not offer substantial cost savings, and would not be an appropriate platform for future transmission upgrades. Exh. Planning-8 at II, 24; exh. DPS Cross-7 at 2.

Appellants' SPC at 40-41 (footnotes omitted). The Board also set out the following evaluation of transmission alternatives:

> Reconductoring the existing West Rutland to New Haven 115 kV line would add thermal capacity to the line, but, compared to the proposed 345 kV line, would only provide a small benefit in terms of avoiding voltage collapse on the line resulting from contingencies elsewhere on the transmission system. Therefore, reconductoring the line would only provide a minimal gain in reliability. A second 115 kV circuit would provide a slightly greater protection against voltage collapse, but still far less than that of the proposed 345 kV line. A 230 kV line instead of a 345 kV line would approach the reliability of the 345 kV line, would cost approximately the same, and would have a similar physical appearance to that of the proposed 345 kV line. All of these alternatives to the West Rutland to New Haven 345 kV line would require adding a second
> 115 kV circuit from Granite to Middlesex to increase the reliability of the alternative up to the same level as the proposed Project. The alternatives to the 345 kV line would all result in higher electrical losses than the 345 kV line, would result in environmental impacts to a third transmission corridor, and would have a similar or slightly higher cost than the proposed Project in order to achieve the same level of reliability as the proposed Project. In addition, the 115 kV and 230 kV alternatives to the 345 kV line would not be compatible with VELCO's long-term expansion plans for extending 345

> kV from New Haven to Williston to a future Champlain substation in Essex. (Although future expansion may be inevitable, it could — and perhaps should — be delayed through proper planning.) If expansion of the transmission system is required at some time in the future, these alternatives would either limit the load serving capability of future system expansions, or would require facilities to be torn down to accommodate the facilities required for the expansion.

Appellants' SPC at 44-5.

2. Joint Appellants fail to establish clear error or any error with respect to the Board's acceptance of the proof for the 345 kV line.

The Court reviews Board findings of fact for clear error. 30 V.S.A. § 11(b). It upholds the findings if there is "any credible evidence to fairly and reasonably support the findings." Hall v. Department of Social Welfare, 153 Vt. 479, 487 (1990). The Court defers to the Board on matters within its expertise. East Georgia, 158 Vt. at 531.

The Joint Appellants do not show clear error in the decision that the proposed project, with a 345 kV and not a 115 kV line from West Rutland to New Haven, is the appropriate transmission solution. The Board's findings are supported by the cited expert testimony. They result from its weighing of this testimony and application of its expertise, including consideration of reliability, cost, possibility of electrical line losses, potential impact on more communities and on the environment, and the potential for a given option to limit the load serving capabilities of possible future expansion or to be torn down before the end of its useful life. These considerations are within the Board's province as the trier of fact and expertise as the state's utility commission. Quechee Lakes Corp., 154 Vt. at 554-55; East Georgia, 158 Vt. at 531; In re Central Vermont Public Service Corp., 167 Vt. 626, 627 (1998) (mem.).

Contrary to Joint Appellants' claims, no law mandates that the Board base its decision on even more evidence. Section 248 does not specify the detail or level of analysis necessary for an affirmative finding under any criterion of § 248(b). Instead, the Board must decide how much detail and analysis it finds persuasive. Cf. In re Green Mt. Power Corp., 142 Vt. 373, 380 (1983) (where broad discretion granted to Board to set rates, Court will not prescribe the approach the Board must use).

The only § 248 judicial ruling the Joint Appellants cite on this issue, Halnon (see Joint Appellants' Brief at 17-20), does not establish the proof required to determine the proper transmission alternative to meet the need under § 248(b)(2). It concerns a denial of a project under the aesthetics criterion of § 248(b)(5). 174 Vt. at 515. Once the Board has determined, under § 248(b)(2), that an alternative is not appropriate to meet the need, evaluation of that alternative's aesthetic or other impacts under § 248(b)(5) is unnecessary. It is the proposed "purchase, investment or construction" for which the Board must make findings. 30 V.S.A. § 248(b). There is no requirement that rejected alternatives to meet the need must undergo a "Quechee" analysis or be examined under all § 248(b) criteria. Further, such a requirement would create a potentially unmanageable level of proof for § 248 proceedings.

The Halnon case also decides not the required proof to issue an aesthetics finding but rather that there was no abuse of discretion in denying a CPG on aesthetic grounds where the applicant "conducted no analysis of alternative sites." Halnon, 174 Vt. at 517. In the alternative, the evidence cited by the Board here far outstrips the "no analysis" of the

Halnon case, since the Board looked at eight possible transmission alternatives and the costs and other pros and cons of each. Appellants' SPC at 39-42, 44-5.

Similarly, nothing in § 248 compels the conclusion advanced by the Joint Appellants that consideration of a project's compatibility with future options is prohibited unless a complete § 248 analysis of the future options is "on the table." Joint Appellants' Brief at 22. The Board's decision to consider compatibility among the factors it weighed was not clearly unreasonable and was supported by DPS expert George Smith:

> I think good transmission planning should consider the future and see if the pieces that are being placed to meet some near-term need or intermediate need will then be useful beyond that point with other upgrades *as opposed to planning a bridge to nowhere that would have to be torn down and replaced by a completely different element*.

Department's SPC at 23-24 (emphasis added). The Joint Appellants unreasonably suggest that the Board must ignore this issue unless it has the equivalent of a § 248 application for the possible future upgrades. Such a requirement would either create a nearly insurmountable bar for § 248 approval or increase the possibility that projects to meet near-term needs are approved without considering this important issue.[5]

The Joint Appellants likewise demonstrate no compelling indication of error when they assert that § 248 disallows approval of a multi-component project unless a least-cost analysis is presented for each project component. Joint Appellants' Brief at 23-27. In an

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[5]Contrary to Joint Appellants' claims, neither DPS nor its witness Mr. Smith suggested below that this factor should be "the" basis for approving the 345 kV line. Joint Appellants' Brief at 5. Rather, this factor was *a* basis for that recommendation, as were the added $3 million cost and the addition of a 16 mile line from Granite to Middlesex, affecting five more communities. NHPC at 15; Prefiled Direct Testimony of George Smith at 18 (Dec. 17, 2003); Department's SPC at 3.

interlocutory order issued below on May 28, 2004, the Board concluded that the statute permits consideration of a coordinated project as a whole:

> Section 248 provides that, prior to issuance of a certificate of public good, the Board must find that the proposed construction of an electric transmission facility satisfies the criteria of Section 248(b). *Nothing in the statute requires piecemeal review of individual facilities when, as here, those facilities are proposed as components of an overall, coordinated project.*
>
> In reviewing petitions under Section 248, the Board has consistently addressed the economic and least-cost criteria for the project as a whole, rather than separate components. For example, on July 17, 2003, the Board issued an Order approving a VELCO project that consisted of upgrading an existing 48 kV line to a 115 kV line and upgrading three substations (the so called "Northern Loop Project"). The Board's Order addressed the economic and least-cost criteria for the Northern Loop Project as a whole rather than addressing the line and substations as separate components. This approach has been used extensively in the past, as is well documented in the Department's May 12 filing.
>
> We are convinced that this is the correct approach when the petitioner contends, and provides testimony, that a project should be treated as a coordinated whole due to the interconnected nature of the transmission system. There might well be situations where we determine that components of a project should be treated separately, but we decline to do so at this point in these proceedings as there has been testimony that the 345 kV line is an integral portion of the NRP.

NHPC at 329-30 (emphasis added).

None of the Joint Appellants' arguments against the Board's interpretation *compels* error. Their claim that the 345 kV line is not "integral" merely reiterates their argument regarding use of a 115 kV option, which the Board rejected. The Joint Appellants simply failed to persuade the Board that the 345 kV line was not an integral part of the project. Moreover, the Board's interpretation correctly relies on the integrated nature of the state's

transmission system, problems on which can require coordinated, multi-component solutions. Id. at 330.

In addition, their emphasis on "facility" ignores that, under § 248(b), the Board makes findings concerning "the purchase, investment or construction," not each individual project component. In fact, the word "facility" is absent from § 248(b)(2), the "need" criterion under which the Board decided that the 345 kV line was part of the appropriate transmission solution.

The Joint Appellants also implicitly concede that "facility" can include a group of project components. The 345 kV line is not a discrete device but a collection of individual pieces of equipment, such as poles, wires and related substation devices, each of which serves a "particular function" and can therefore be characterized as a "facility." Joint Appellants' Brief at 24. The Joint Appellants' preference for a different grouping of facilities establishes no error by the Board.

C. The Board's decision on medical devices is adequately explained and supported by the evidence.

With respect to the project's potential impact on medical devices, the Board met its obligations under 3 V.S.A. § 812(a), the purpose of which is to require a clear statement "of what was decided and how the decision was reached." Louis Anthony Corp. Dept of Liquor Control, 139 Vt. 570, 573 (1981). The Board's orders show it considered the public health evidence in the record, including the potential impacts of electric and magnetic fields ("EMF") on medical devices, and state a decision that the project would have no undue adverse effects on public health. Appellants' SPC at 63 and 71-72. The

Board explained the basis for that decision in its order, and clarified the order in response to Joint Appellants' post-decision motion.[6] Appellants' SPC at 76, Shelburne's PC at 7-10.

The Joint Appellants incorrectly assert, without record support, that there exists an established health-based standard for levels of exposure of medical devices to electric fields from power lines and that levels above that standard require individuals with medical devices to significantly change their daily activities. The American Conference of Governmental Industrial Hygienists ("ACGIH") guideline, relied on by Joint Appellants, is a voluntary occupational guideline, *not a health-based standard*, and it does not purport to establish safe exposure levels for the general public. Department's PC at 29-30. As the Board stated in response to Joint Appellants' post-decision motion:

> *There are no state or federal standards for medical device exposure to EMF.* The ACGIH has established EMF guidelines for workers with cardiac pacemakers, and other medical devices for which there is no specific information from the device manufacturer. The ACGIH guidelines are not health-based, but rather are identified to control EMF exposure of workers and '*are not intended to demarcate safe and dangerous levels*." Exh. Mark-2 at 47 [Department's PC at 30]. There is no evidence in the record that standards have been established by any other recognized authority for other medical devices. *There is no evidence in the record that EMF from power lines, which are ubiquitous in our society, has caused disruption of medical devices.*

Shelburne's PC at 10 (emphasis added).

Joint Appellants also appear to argue that the Board erroneously ignored Section 6 of Dr. Valberg's report (NHPC at 437-440) that identified precautions recommended by

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[6]For the purpose of this medical device section only, the phrase "Joint Appellants" includes Mr. and Mrs. Simmons.

some medical device manufacturers. Joint Appellants' Brief at 30. However, the Board did rely on Section 6 of Dr. Valberg's report and there is no error in the Board's treatment of this issue. Quoting from the concluding summary of Section 6, the Board found that:

> Despite the ubiquitous nature of public exposure to EMF from high-voltage transmission lines, *no recorded cases of medical-device disruption by powerline EMF were identified either in the manufacturers' websites or in . . . an analysis of available data*. There are no FDA-issued safety alerts, public health advisories, and notices addressing potential medical device interference from power frequency EMF.

Appellants' SPC at 71-72, Finding 151 (emphasis added); NHPC at 409 and 440.

Further, the Board specifically explained why it was rejecting the Joint Appellants' assertions as to the alleged impact on individuals with medical devices:

> We do not find helpful the Simmons's assertions of the alleged consequences that would occur if VELCO was allowed to construct the proposed transmission lines. There is sufficient evidence in the record to indicate that the EMF resulting from the proposed lines will not present a health risk to individuals with medical devices. Common sense, combined with the evidence that this problem has not occurred anywhere in the United States, indicates that the existence of transmission lines is not currently preventing individuals with medical devices from "ever again walking their dog, jog, stroll, or bicycle along town roads that cross the right-of-way."

Shelburne's PC at 9 (footnote omitted).

The Board did not clearly err, or err at all, in its decision on the medical device issue. It examined "with both care and sympathy, all the factual evidence and expert testimony in the evidentiary record" regarding the EMF issues presented in the case. SPC at 6. It weighed the evidence, made specific findings and concluded that the project, as proposed, met the statutory criteria. See East Georgia, 158 Vt. at 531 (Court accepts findings of fact unless clearly erroneous).

D. The Joint Appellants fail to demonstrate reversible error with regard to the Board's reference to "evidence and plans submitted in this proceeding."

Below, the Board included the following paragraph in its order:

> The proposed Project, in accordance with the evidence and plans submitted in this proceeding, and as modified and conditioned by this Order, will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248, and a certificate of public good to that effect shall be issued with the conditions set forth in paragraphs 2 through 20 below.

Appellants' SPC at 226. The Joint Appellants assert this paragraph constitutes error by approving "specific locations." Joint Appellants' Brief at 34.

1. The Joint Appellants cannot maintain an appeal when they are not harmed and which asserts others' rights.

A party must be aggrieved to appeal. 30 V.S.A. § 12; In re M.C., 156 Vt. 642 (1991) (mem.). To establish standing, the rights of the appealing party "must be adversely affected by the judgment." M.C., 156 Vt. at 643. A party cannot assert the rights of others. Hinesburg Sand & Gravel Co. v. State, 166 Vt. 337, 341 (1997).

The Joint Appellants may not appeal on this issue because they are not harmed by the reference to submitted evidence and plans. They had notice of the plans and evidence and the opportunity to respond and cross-examine. They also do not show which of the "specific locations" causes them harm or how the harm is caused.

New Haven and Middlebury claim to be statutory parties to condemnation proceedings, but whether they are such parties is not properly before the Court because this appeal is not from such a proceeding. The decision below is final as to the issuance of a CPG under § 248 but does not determine intervention rights in a necessity proceeding. See

In re Cliffside Leasing Co., 167 Vt. 569, 570 (1997) (final judgment is prerequisite to appeal). In the alternative, the applicable statute does *not* declare the town to be a party or relieve it from establishing intervention under the applicable Board rules; instead, it requires that the Board issue notice to the town in the form of a citation. 30 V.S.A. § 112; PSB Rule 2.209, 8 Code of Vt. Rules 30-000-001-19. In contrast, the legislature has specifically declared entities required to receive notice to be statutory parties where it meant them to be such parties. 10 V.S.A. §§ 6084(a), 6085(c)(1).

The Joint Appellants improperly assert others' rights, mentioning three times rights possessed by adjoining landowners. Joint Appellants' Brief at 34-5. But no statute empowers them to represent *individual landowners* in § 248 or condemnation proceedings. See, e.g., 30 V.S.A. §§ 112, 248. They assert in a footnote that "the legislature explicitly contemplated municipal representation of *its residents'* interests in §§ 248(a)(4)(A)(c) and (b)(1)" (Joint Appellants' Brief at 32, n. 2), but the referenced statutes contain no such "explicit" contemplation or authority to represent individuals.

2. In the alternative, the Joint Appellants fail to show clear error or any error in the Board's reference to submitted evidence and plans.

In the alternative, the Joint Appellants have not shown abuse of discretion or any error. It was not clearly unreasonable for the Board to refer to the submitted evidence and plans that describe the project it approved as promoting the public good.

The Joint Appellants also incorrectly claim that specific locations must be decided in necessity proceedings. Joint Appellants' Brief at 34. Instead, the Court has affirmed the Board's authority to determine specifics during post-certification review, an extensive

process for which was mandated by the Board below. Vt. Electric Power Co. v. Bandel, 135 Vt. at 145; Appellants' SPC at 213-220. The challenged reference does not decide the issue in a condemnation proceeding, which is "the necessity of constructing these lines so as to affect the individual's particular property interests." Auclair v. Vt. Elec. Power Co., 133 Vt. 22, 27 (1974).

In addition, none of their cited cases actually bars the Board from deciding specifics before issuing a CPG. Vt. Electric Power Co., 131 Vt. at 434-5; Auclair v. Vt. Elec. Power Co., Inc., 132 Vt. 519, 521 (1974); Auclair v. Vt. Electric Power Co., 133 Vt. at 26-28; Vt. Electric Power Co. v. Bandel, 135 Vt. at 145.

The Court should reject the Joint Appellants' alternative claim that the reference is unlawful by incorporating "unspecified portions of the record." Joint Appellants' Brief at 35. The Court previously affirmed similar orders in zoning and Act 250 cases. In re Duncan, 155 Vt. 402, 410 (1990); In re Denio, 158 Vt. 230, 241 (1992). In Duncan, the Court stated: "Since the specific proposal is contained in the exhibits, as well as the testimony offered by [the applicant], we believe the order is sufficiently specific to ascertain what has been approved." 155 Vt. at 410. This case goes beyond Duncan: Not only do VELCO's plans and exhibits contain the proposal, it is described extensively throughout the order, as are the many required modifications.

CONCLUSION

Based on the foregoing, the Court should affirm the Board's decision below.

Dated at Montpelier, Vermont this 13th day of June, 2005.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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Aaron Adler, Special Counsel